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JAMES R. BROWNING, Clerk

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1958

**No. 226**

GENERAL PUBLIC UTILITIES CORPORATION, as common parent corporation of an affiliated group of corporations, et al.,
*Petitioners,*

*vs.*

UNITED STATES OF AMERICA,
*Respondent.*

**On Petition for a Writ of Certiorari to the United States Court of Claims**

## REPLY TO BRIEF FOR THE UNITED STATES

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September 19, 1958.

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## REPLY TO BRIEF FOR THE UNITED STATES

Petitions for writs of certiorari in *Idaho Power Company* v. *United States* (No. 236 this term) and *Atlantic City Electric Company* v. *United States* (No. 251 this term) present the same question presented by the petition in the instant case—whether a public utility company is entitled to a dividends paid credit under Section 26(h) of the Internal Revenue Code of 1939 for premiums paid from earnings and profits in redeeming its preferred stock. In addition, the *Idaho Power Company* case presents the question whether public utilities are entitled to such credits for cash premiums paid by them in tax-free reorganization exchanges of their preferred stocks. The Government has opposed the grant of certiorari on the redemption premium issue in all three cases, but has joined in the petition for certiorari in the *Idaho Power Company* case on the ex-

change premium issue. This brief is submitted to urge that certiorari should be granted on the redemption premium issue in all three cases along with certiorari on the exchange premium issue in No. 236.

The Government states in its Memorandum in No. 236 that it has urged upon the lower Federal courts in the past, and apparently will urge here in the *Idaho Power Company* case, that the teaching of *Commissioner* v. *Estate of Bedford*, 325 U.S. 283 (1945) is that "the sufficiency of earnings and profits is the sole test of dividend effect" (p. 13). It points out that this Court indicated in *Estate of Bedford* that even though a reorganization exchange is a partial liquidation under Sections 115(c) and (i) of the 1939 Code, if the exchange embodies a distribution of boot from earnings and profits, it has the effect of a dividend because Section 115(a) rather than 115(c) determines the character of "dividend" distributions referred to in other Sections of the Code. The Government does not dispute that by the test of *Estate of Bedford*, the character of the exchange premium in No. 236 is determined by Section 115(a), and therefore it is a dividend for which credit is to be given under Section 26(h).

We suggest that the same considerations which thus bring the exchange premium within the credit for dividends paid provided by Section 26(h) are persuasive in indicating that the redemption premium likewise falls within Section 26(h). Certainly, the two questions are so interrelated that resolution of the one has a significant bearing on the resolution of the other. Thus, it is difficult to see how this Court can decide, as the Government apparently contemplates in No. 236, that a distribution coming within Sections 115(c) and (i) is a dividend when made as an exchange premium and accept the argument made by the Government in its opposition in this case that both under the Code (pp. 7-11) and under the Regulations (pp. 11-13) distributions coming within Sections 115(c) and (i) "cannot constitute 'dividends' under Section 115(a) from any point of view" (p. 11). If the Government is correct in this argument, substantial doubt is cast upon its

view of *Estate of Bedford*. And if the Government's view of *Estate of Bedford* is correct, this underpinning of its argument in our case should fall.

On any view, and particularly if the Court accepts the Government's position on *Estate of Bedford*, resolution of the exchange premium issue will decide questions highly pertinent to the resolution of the redemption premium issue. Hence, unless the latter is also brought to the Court for explicit ruling, the effect of a decision in the exchange premium case will be to cast some light but many shadows on the redemption premium issue. That issue, as we have pointed out, affects utility companies in 48 states and will undoubtedly produce extensive litigation until it is definitively resolved. Sound judicial administration requires that if the Court should speak on the exchange premium issue, it also should rule on the redemption premium issue.

## CONCLUSION

**This Court should grant the petitions for writs of certiorari in all three cases.**

Respectfully submitted,

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September 19, 1958.